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March 9, 2016

Lyle W. Cayce
Clerk, United States Court of Appeals for the Fifth Circuit
F. Edward Hebert Bldg.
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Chesapeake Energy Corp. and its wholly-owned subsidiary, Chesapeake Operating, Inc. v. National Labor Relations Board*, 5th Cir. No. 15-60236

Dear Mr. Cayce,

On February 12, 2016, the Court handed down its opinion granting in part the petition of Chesapeake Energy Corp. and its wholly-owned subsidiary, Chesapeake Operating, Inc. ("Chesapeake"), and granting in part the cross-application of the National Labor Relations Board (the "Board") for enforcement of a Board order. Pursuant to Rule 19 of the Federal Rules of Appellate Procedure, Chesapeake respectfully submits the enclosed Proposed Judgment "conforming to the opinion." Fed. R. App. P. 19.[1]

The Board's proposed judgment does not conform to the Court's opinion or is otherwise improper in the following respects.

Subsection 1(b) of the Board's proposed judgment includes cease-and-desist language directed to actions of Chesapeake "[i]n any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act." This vague and overbroad provision goes far beyond the issues in this case; it does not conform to the Court's opinion enforcing "the portion of the Board order related solely to clarifying that the Agreement does not preclude filing charges with the Board." Slip Op. at 3.

[1] The recitation paragraph of Chesapeake's proposal tracks verbatim the language of the Court's opinion (Slip Op. at 3, 4), except in one respect. Because the Court's opinion resolving this appeal relies directly on the precedent established in *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *see* Slip Op. at 3-4, the Chesapeake proposal tracks language from the *D.R. Horton* decision, 737 F.3d at 362, to explain the basis for granting Chesapeake's petition.

Subsections 2(a) and (b) of the Board's proposed judgment contemplate that Chesapeake might be required to "rescind" the Agreement, but a rescission requirement does not conform to the Court's opinion enforcing "the portion of the Board order related solely to clarifying that the Agreement does not preclude filing charges with the Board." The Court should not induce termination of existing employment relationships attendant on any inability to renegotiate a rescinded arbitration agreement; a requirement to "revise" the Agreement is sufficient.

Subsection 2(b) of the Board's proposed judgment would require Chesapeake to notify "all current and future employees" concerning rescission or revision of the arbitration agreement. That requirement is overbroad. First, supervisory employees are excluded from the statutory definition of employees capable of filing unfair labor practice charges. 29 U.S.C. § 152(3). Thus, any notice requirement should exclude supervisory employees.

Second, requiring actual notice to all former employees who have left the employ of Chesapeake over the past eight years (the approximate period of "current and former employees who were required to sign the Agreement") would impose a virtually impossible task with no corresponding benefit. Chesapeake's proposed judgment solves this overbroad requirement by requiring actual notice only to former employees who have left Chesapeake in the six months prior to the date of the Fifth Circuit's judgment. This limitation reasonably conforms to the Court's opinion, because only those former employees could possibly have a live charge to file with the Board under the applicable six-month statute of limitations. *See* 29 U.S.C. § 160(b) ("[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.").

Subsection 2(c) of the Board's proposed judgment would require that Chesapeake post—at *all* Chesapeake facilities—a notice concerning both (i) general provisions of the law enforced by the Board and (ii) the remedial portions of the Board order enforced by the Court's judgment. That provision conflicts with the decision of the Fourth Circuit that, by contrast to statutory authority empowering other federal agencies, the Board's statute does not authorize the Board to force employers to post notices. *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013). It is also superfluous in light of the provision, included in Chesapeake's proposal, that all current non-supervisory personnel receive *actual* notice of Chesapeake's revision of the Agreement. Subsection 2(c) does not conform to the opinion enforcing "the portion of the Board order related solely to clarifying that the Agreement does not preclude filing charges with the Board," but seeks to sweep far beyond the narrow contours of the opinion.

If the Court's judgment does require a posted notice, Chesapeake respectfully submits that the notice should omit any "shaming" statements about findings of violations of federal law, requiring notice solely as follows: "Chesapeake is revising its arbitration agreement to make clear that the agreement does not preclude filing unfair labor practice charges with the Board." That is the only statement needed to conform any such notice to the Court's opinion, as required by Fed. R. App. 19.

In the end, the enclosed Judgment proposed by Chesapeake is appropriate to solve all the problems with the Board's proposal.

Sincerely,

/s/ *Russell S. Post*

Russell S. Post

RSP/lc
Attachment

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2016, I electronically transmitted this document using the Court's ECF System. I further certify that counsel of record for Respondent are being served with a copy of this document by electronic means via the Court's ECF system, as follows:

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/s/ *Russell S. Post*
Russell S. Post

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60236
Summary Calendar

CHESAPEAKE ENERGY CORPORATION, and its wholly owned subsidiary Chesapeake Operating, Incorporated

Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Petition for Review and Cross-Application for Enforcement of an Order
of the National Labor Relations Board
NLRB No. 14-CA-100530

JUDGMENT

Before KING, CLEMENT, and OWEN, Circuit Judges.

Chesapeake Energy Corp. and its wholly owned subsidiary, Chesapeake Operating, Inc. (collectively Chesapeake), petitioned for review of the above-numbered order of the National Labor Relations Board (NLRB), and the NLRB cross-petitioned for enforcement of that order. On February 12, 2016, this Court filed its opinion granting the Chesapeake petition in part and enforcing the NLRB order in part. In conformity with this Court's opinion and FED. R. APP. 19, this Court settles and enters judgment enforcing the NLRB order in part, as follows.

It is ADJUDGED that Chesapeake's petition for review of the NLRB order is GRANTED insofar as the Board's order addresses the provision of the pertinent Chesapeake arbitration agreement waiving the right to pursue class or collective actions, because arbitration agreements with such class waivers are enforceable by reason of the Federal Arbitration Act. It is further ADJUDGED that the portion of the NLRB order related solely to clarifying that the Agreement does not preclude filing charges with the NLRB is ENFORCED, because an employee would reasonably interpret the agreement as prohibiting the filing of an unfair labor practice charge with the NLRB. Accordingly, Chesapeake shall:

1. Cease and desist from maintaining a mandatory arbitration agreement that employees would reasonably interpret as prohibiting the filing of an unfair labor practice charge with the NLRB.

2. Take the following affirmative action:

   (a) Revise the Chesapeake Arbitration Agreement and Dispute Resolution Policy ("Agreement") to clarify that the Agreement does not preclude filing unfair labor practice charges with the NLRB;

   (b) Notify all current non-supervisory employees who were required to sign the Agreement that the Agreement has been revised and provide them a copy of the revised Agreement.

   (c) Notify all former non-supervisory employees who left the employment of Chesapeake within the six-month period immediately prior to the date of this judgment and were required to sign the Agreement that the Agreement has been revised and provide them a copy of the revised Agreement.

   (d) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on the form served by the Region attesting to the steps that the Respondents have taken to comply with this Judgment.

Mandate shall issue forthwith.